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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

DONALD N. SNYDER, JR., DIRECTOR,
ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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60 pp

QUESTION PRESENTED

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 to 12165 (1994 & Supp. IV 1998), is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

Petitioner is the United States of America, which intervened in the court of appeals to defend the constitutionality of Congress's abrogation of Eleventh Amendment immunity in the Americans with Disabilities Act of 1990, 42 U.S.C. 12202. John Walker was the plaintiff in the district court and an appellant in the court of appeals.

Respondents are Donald N. Snyder, Jr., Harry Shuman, George DeTella, Jerome Springborn, Dr. Elyea, and Diane Jockisch, officials of the Illinois Department of Corrections sued in their official capacity.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, as amended (App., *infra*, 1a-6a, 33a-35a), will be reported at 213 F.3d 344.[1] The opinions of the district court (App., *infra*, 7a-21a, 22a-32a) are unreported.

[1] The soft-bound supplemental version of volume 213 F.3d contains the unamended version of the court of appeals' opinion. The amended version of the opinion, however, can be found on Westlaw at the designated citation.

JURISDICTION

The court of appeals entered its judgment on May 16, 2000. The United States's petition for rehearing was denied on July 12, 2000 (App., *infra*, 33a-35a). The court denied plaintiff-appellant John Walker's petition for rehearing on August 29, 2000 (App., *infra*, 36a-37a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth at App., *infra*, 38a-54a.

STATEMENT

1. The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, is a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. 12101(b)(1). Based on extensive study and fact-finding by Congress,[2] and Congress's lengthy experience with the analogous nondiscrimination requirement in Section

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[2] Fourteen congressional hearings and 63 field hearings by a special congressional task force were held in the three years prior to passage of the Disabilities Act. See S. Rep. No. 116, 101st Cong., 1st Sess. 4-5, 8 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 24-28, 31 (1990); *id.* Pt. 3, at 24-25; *id.* Pt. 4, at 28-29; see also Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 393 & nn.1-3 (1991) (listing the individual hearings). Congress also drew upon reports submitted to Congress by the Executive Branch. See S. Rep. No. 116, *supra*, at 6 (citing United States Civil Rights Comm'n, *Accommodating the Spectrum of Individual Abilities* (1983); National Council on Disability, *Toward Independence* (1986); and National Council on Disability, *On the Threshold of Independence* (1988)); H.R. Rep. No. 485, *supra*, Pt. 2, at 28 (same).

504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (1994 & Supp. IV 1998), Congress found in the Disabilities Act that:

> (2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;
>
> (3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;
>
> * * * * *
>
> (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;
>
> (6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally; [and]

> (7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society[.]

42 U.S.C. 12101(a). Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. 12101(b)(4).

The Disabilities Act targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities.

This cases involves a suit under Title II of the Disabilities Act, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is defined to include "any State or local government" and

its components. 42 U.S.C. 12131(1)(A) and (B).[3] The prohibition on discrimination may be enforced through private suits against public entities. See 42 U.S.C. 12133; see also *Olmstead* v. *L.C.*, 527 U.S. 581, 590 (1999). The Act expressly abrogates the States' Eleventh Amendment immunity. 42 U.S.C. 12202 (a "State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter").

2. The plaintiff in this case, John Walker, is a prisoner with vison impairments who is incarcerated by the Illinois Department of Corrections. App., *infra*, 1a. He filed a *pro se* action in federal district court alleging that respondent state officials, sued in their individual and official capacities, failed to provide him with accommodations for his disability in violation of Title II of the Disabilities Act. *Id.* at 1a-2a. On cross-motions for summary judgment, the district court concluded that respondents had violated the Act in one respect. *Id.* at 2a. But the court declined to order relief because it found that respondents were entitled to qualified immunity on the damages claims, *ibid.*, and that injunc-

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[3] Congress extended the obligations of the Disabilities Act to itself and its instrumentalities in 1990. See Pub. L. No. 101-336, Title V, § 509, 104 Stat. 373, superseded by Pub. L. No. 104-1, Title II, §§ 201(a)(3), 210(b)(1), 109 Stat. 7, 13, currently codified at 2 U.S.C. 1311(a)(3), 1331(b)(1) (Supp. IV 1998); 42 U.S.C. 12209 (1994 & Supp. IV 1998). While the Disabilities Act does not apply to the executive branch of the federal government, virtually identical prohibitions are imposed by Sections 501 and 504 of the Rehabilitation Act, which, since 1978, has governed "any program or activity conducted by any Executive agency." 29 U.S.C. 794(a) (1994 & Supp. IV 1998).

tive relief was not appropriate because respondents had brought themselves into compliance, *ibid.*[4]

3. On appeal, respondent state officials invoked, for the first time, Eleventh Amendment immunity as an alternative ground for dismissing Walker's claims. The United States intervened on appeal, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of the abrogation of immunity. After this Court granted certiorari in *Board of Trustees of the University of Alabama* v. *Garrett*, No. 99- 1240, the United States moved to abate the appeal pending this Court's disposition of *Garrett*. The court of appeals, however, held that the Disabilities Act's abrogation of immunity for claims arising under Title II was not valid legislation to enforce the Fourteenth Amendment, following its prior decisions to the same effect for cases arising under Title I of the Disabilities Act, *Erickson* v. *Board of Governors*, 207 F.3d 945 (2000), petition for cert. pending, No. 99-2077, and *Stevens* v. *Illinois Department of Transportation*, 210 F.3d 732 (2000), petition for cert. pending, No. 00-7. App., *infra*, 5a. The court of appeals thus vacated the district court's judgment concerning Title II of the Disabilities Act and remanded with instructions to dismiss the claim without prejudice. *Id.* at 6a.[5]

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[4] The district court also dismissed Walker's Eighth Amendment claims. App., *infra*, 14a-19a. The court of appeals held that Walker abandoned those claims on appeal by failing to brief them adequately. *Id.* at 2a.

[5] In conjunction with its Eleventh Amendment immunity ruling, the court of appeals also ruled that suits under Title II could not proceed against state officials in their individual capacity, see App., *infra*, 3a-4a, and that the Eleventh Amendment barred the action against respondents in their official capacity even for prospective injunctive relief, see *id.* at 5a-6a. On rehearing, the court

REASON FOR GRANTING THE PETITION

On April 17, 2000, this Court granted review in *Board of Trustees of the University of Alabama* v. *Garrett*, No. 99-1240 (oral argument scheduled for October 11, 2000). That case presents a challenge to the abrogation of Eleventh Amendment immunity for both Titles I and II of the Disabilities Act, and thus encompasses the same question raised by this petition. Accordingly, this petition should be held pending the Court's decision in that case.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Board of Trustees of the University of Alabama* v. *Garrett*, No. 99-1240, and disposed of in accordance with the decision in that case.

Respectfully submitted.

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OCTOBER 2000

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amended the opinion to hold that the official capacity suits were barred, not by the Eleventh Amendment, but by the terms of the statute. *Id.* at 33a-35a.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96 C 469—**Blanche M. Manning**, *Judge*
No. 98-3308

JOHN WALKER, PLAINTIFF-APPELLANT

v.

DONALD N. SNYDER JR., DIRECTOR,
ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL.,
DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

Submitted Feb. 18, 2000–Decided May 16, 2000
As Revised on Denial of Rehearing July 12, 2000

Before: BAUER, EASTERBROOK, and RIPPLE, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.*

John Walker has no vision in his right eye and poor vision in his left—though with corrective lenses, bright light, and concentration he can read. Since 1993 Walker has been imprisoned by Illinois for residential burglary, and he wants the state to accommodate his condition in

several ways: books on tape, a brightly lit cell to himself (so that he can read better and does not have to worry about a cellmate put out of sorts by having to tolerate his disability), and transfer to a less restrictive prison. According to Walker, Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-65, requires Illinois to provide these accommodations. His suit initially included arguments under the eighth amendment and 42 U.S.C. § 1983, but these were dismissed by the district court and are not developed in Walker's appellate brief. We therefore treat Walker's claim as arising wholly under the ADA.

At the time Walker filed suit, Illinois was not providing books on tape. The district court concluded that this violated the Act but held that the defendants need not pay damages because, until *Pennsylvania Department of Corrections* v. *Yeskey*, 524 U.S. 206, 118 S. Ct. 1952, 141 L.Ed.2d 215 (1998), and *Crawford* v. *Indiana Department of Corrections*, 115 F.3d 481 (7th Cir. 1997), application of the ADA to prisoners was open to question. Consequently, the district court held, the defendants are entitled to qualified immunity. Because prison officials now provide Walker with audio books, he is not entitled to prospective relief on that subject, the court concluded. Walker continues to seek not only a better placement within the prison system but also free equipment to play the books. Illinois loaned Walker a tape player, but it required him to promise to reimburse the state if either the tapes or the player should be lost or damaged. Walker believes that this violates the ADA, but the district judge disagreed. According to the court, Walker's remaining claims are legally insufficient, so the court dismissed the complaint for failure to state a claim on which relief may be

granted. 1998 U.S. Dist. LEXIS 9128 (N.D. Ill. June 9, 1998).

The district court's conclusion that legal uncertainty prevents an award of damages for a violation of the ADA is incorrect. Although several decisions have held or assumed that individual defendants are entitled to qualified immunity in ADA litigation, see, *e.g.*, *Hall* v. *Thomas*, 190 F.3d 693, 696-97 (5th Cir. 1999); *Key* v. *Grayson*, 179 F.3d 996, 999-1000 (6th Cir. 1999), none of these opinions considered whether natural persons are proper defendants in the first place. (What is more, none of these decisions discussed whether it is sound to extend immunity principles from litigation under 42 U.S.C. § 1983 to suits under more recent, and more detailed, laws. We, too, can avoid addressing that question.)

Qualified immunity is a personal defense, which does not apply to institutional defendants in suits under federal statutes. *Owen* v. *Independence*, 445 U.S. 622, 100 S. Ct. 1398, 63 L.Ed.2d 673 (1980). In suits under Title II of the ADA, as under many other federal anti-discrimination laws, such as Title VII and the ADEA, the proper defendant usually is an organization rather than a natural person. Under Title II of the ADA, which forbids discrimination by "any public entity", 42 U.S.C. § 12131, the proper defendant is that "entity." Although Walker did not name the state's Department of Corrections as a defendant, he did name its director, who stands in for the agency he manages. The director and all of the other defendants must have been sued in their official capacities—that is, as proxies for the state, *Will* v. *Michigan Department of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L.Ed.2d 45 (1989); *Kentucky* v.

Graham, 473 U.S. 159, 105 S. Ct. 3099, 87 L.Ed.2d 114 (1985)— rather than their individual capacities, because the ADA addresses its rules to employers, places of public accommodation, and other organizations, not to the employees or managers of these organizations. *Silk* v. *Chicago*, 194 F.3d 788, 797 n.5 (7th Cir. 1999), holds that there is no personal liability under Title I of the ADA. Although we have not previously extended this conclusion to Title II, see *Bryant* v. *Madigan*, 84 F.3d 246, 249 (7th Cir. 1996), the relevant text of the ADA does not draw any distinction for the purpose of identifying the appropriate defendants. Thus we agree with *Alsbrook* v. *Maumelle*, 184 F.3d 999, 1005 n.8 (8th Cir. 1999) (en banc), that as a rule there is no personal liability under Title II either. (We have therefore substituted Donald Snyder, the current director, for his predecessor Odie Washington. See Fed. R. App. P. 43(c)(2).) Perhaps some sections of the ADA other than the ones involved here allow personal liability; it is a complex statute, with several titles, and it would be foolish for a court to declare *a priori* that none of its many rules is exceptional. In the main, however, and in this case, institutional liability is exclusive, so qualified immunity is unavailable.

Because defendants have been sued and could be liable only in their official capacities, we must consider their argument that the eleventh amendment closes the doors of the federal courts. Although the commerce clause gives Congress ample authority to enact the ADA, legislation based only on the commerce clause does not subject states to private litigation in federal court. Legislation based in § 5 of the fourteenth amendment, by contrast, supports private litigation. *Fitz-*

patrick v. *Bitzer*, 427 U.S. 445, 96 S. Ct. 2666, 49 L.Ed.2d 614 (1976).

In the wake of *Kimel* v. *Florida Board of Regents*, __ U.S. __, 120 S. Ct. 631, 145 L.Ed.2d 522 (2000), we have held that § 5 does not afford Congress the authority to enact Title I of the ADA. *Erickson* v. *Board of Governors for Northeastern Illinois University*, 207 F.3d 945 (7th Cir. 2000); *Stevens v. Illinois Department of Transportation*, 210 F.3d 732 (7th Cir. 2000). Our opinion in *Erickson* reserved questions concerning other titles of the ADA, which potentially have different scope. But Walker's claim falls squarely within both *Erickson*'s and *Stevens*'s reasoning, for those cases concluded that Title I of the ADA cannot be based on § 5 to the extent that it requires accommodation of disabilities (rather than simply requiring the state to disregard disabilities) and to the extent that it forbids a state to take account of disabilities that are rationally related to permissible objects of public action. Walker wants Illinois to accommodate rather than ignore his disability. He does not contend (and could not reasonably contend) that it is irrational for a state to ask for repayment if loaned property is lost or damaged, or to put a prisoner in a two-person cell.

Walker relies not only on § 5 but also on *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908), which holds that many suits against state officers in their own names are outside the eleventh amendment, at least to the extent they concern prospective rather than monetary relief. See, e.g., *Will*, 491 U.S. at 71 & n.10, 109 S. Ct. [at] 2304; *Young*, 209 U.S. at 159-60, 28 S. Ct. [at] 441. But a suit based on *Young* is a suit against state officers as individuals, not against the state itself. We

held above that the only proper defendant in a action under the provisions of the ADA at issue here is the public body as an entity. A suit resting on the *Young* approach is not a suit against the public body and therefore cannot support relief. Walker must pursue all of his ADA theories in state court.

The judgment of the district court is vacated, and the case is remanded with instructions to dismiss the ADA claim, without prejudice, for want of jurisdiction.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 96 C 0469
Judge Blanche M. Manning

JOHN WALKER, PLAINTIFF

v.

ODIE WASHINGTON, DIANE JOCKISH[1], GEORGE DETELLA, WARDEN SPRINGBORN, DR. ELYEA, AND DR. HARRY SHUMAN, DEFENDANTS

[Filed: Jan. 26, 1998]

MEMORANDUM OPINION AND ORDER

Plaintiff John Walker, a prisoner in the custody of the Illinois Department of Corrections (IDOC) presently housed at Hill Correctional Center, brought this *pro se* civil rights action against IDOC officials alleging violations of the Eighth Amendment and the Americans With Disabilities Act, 42 U.S.C. § 12101 et seq. (ADA) while he was housed in Stateville Correctional Center. Walker named as defendants IDOC Director Odie Washington, IDOC Medical Director Dr. Harry Shuman, Stateville's Warden, George DeTella, Assistant

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[1] According to counsel's filings, her name is spelled "Jockisch," and we will use this spelling.

Warden Jerome Springborn, and Medical Director Dr. Elyea, and IDOC Transfer Coordinator Diane Jockisch.

The court granted Walker leave to proceed in forma pauperis April 22, 1996. Defendants moved for summary judgment on May 16, 1997. Walker responded with his own motion for summary judgment on June 2, 1997. The court will rule on both motions.

SUMMARY JUDGMENT PROCEDURE

Rule 56(c) of the Federal Rules of Civil Procedure provides that a summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The court is to draw all reasonable inferences in favor of the non-movant, but the non-moving party is required to go beyond the pleadings and designate specific facts showing a genuine issue for trial. *Bank Leumi Le-Israel, B.M.* v. *Lee*, 928 F.2d 232, 236 (7th Cir. 1991).

Local Rule 12(m) of this court requires a party moving for summary judgment to submit a statement listing the material facts it believes to be undisputed and which, taken together, entitle it to judgment as a matter of law. Rule 12(n) requires the non-moving party to respond specifically to these allegations, and, where it denies that a fact is undisputed, to come forward with references to the record that support a contrary finding. Statements of undisputed fact not denied in accordance with the rule may be deemed admitted if properly supported by references to the record or other evidentiary material. *Stewart* v.

McGinness, 5 F.3d 1031, 1034 (7th Cir. 1993), cert. denied, 510 U.S. 1121 (1994).

Walker's summary judgment motion is really no more than a response to the defendants' motion. It merely states the legal conclusion that defendants have violated his rights and he is entitled to relief, but contains no citations to the record. Not only does the motion fail to comply with Local Rule 12(m), it does not show that Walker is entitled to judgment on any claim, and so does not meet the requirements of Rule 56, either. The motion is summarily denied.

Taken as a response to the defendants' motion, Walker's summary judgment motion does not contain a statement of facts in dispute as required by Rule 12(n), nor does it add any evidentiary materials to the record. When they served Walker with their motion, the defendants provided a cautionary instruction, warning him that unless he responded with affidavits or other evidentiary material contradicting the factual assertions in the defendants' affidavits, they would be accepted as true. Walker was not specifically advised as to the effect of his failure to file a Rule 12(n) statement. In the order of July 15, 1997, the court directed defendants to send Walker a copy of Local Rules 12(m) and 12(n), but did not set a date for this to be done or require defendants to certify when it had been done. To insure fairness to Walker the court will not enforce the presumptions of Rule 12, but will review the record under the standard of Rule 56. Walker's complaint, which is made under penalty of perjury, will be treated as an affidavit for purposes of the summary judgment

motion. *Ford v. Wilson*, 90 F.3d 245, 247 (7th Cir. 1996).[2]

Walker did not break down his complaint into separate claims, so it is necessary for the court to do so. We will take the facts of each claim and consider whether, taking as true both the statements of fact found in the verified complaint and, where not contradicted by the complaint, the statements found in the defendants' affidavits, and determine whether the defendants are entitled to judgment on that claim.

ANALYSIS OF WALKER'S CLAIMS

A. Accommodating Walker's Visual Handicap

Walker's factual allegations are contained in a section titled "Facts of Claim" attached to the complaint form. Walker is visually disabled. Exhibit 1 to the complaint is a decision by an administrative law judge of the Department of Health and Human Services dated April 22, 1991, finding him disabled and eligible for Supplemental Security Income. The medical report states that he is completely blind in his right eye and had visual acuity of 20/200 (corrected) in his left. When he was placed in Stateville, the medical history form dated June 10, 1994 states that he is blind in the right eye and his left eye has a visual acuity of 20/100 (corrected). Walker states that he has to use magnifiers in order to read, and excessive use of magnifiers causes pain in his eyes and damage to his remaining vision.

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[2] Walker's response, though sworn before a notary, contains only legal conclusions and no factual assertions.

Walker states that he requested that he be provided with books on tape and was not given them. A response to one such request from counselor S. Carter dated February 17, 1995 states:

> Chapter 730, ILCS requires that inmates be allowed "access to" published materials, etc. However, there is no requirement for us to arrange this. You can order tapes. They will be reviewed by the Publication Review Committee and forwarded to you if approved. Although tape recorders are not allowed you can order a cassette player through the commissary. I am enclosing a current commissary price list.

Cmplt. Exh. 4.

Exhibit 5 is a letter dated August 3, 1995 addressed to defendant Assistant Warden Springborn as ADA Coordinator complaining that Walker would not have suffered damage and pain in his eye if he had been provided with books on tape. According to the letter, he enclosed proof of his disability and the text of the ADA. Walker states in his complaint that he received no reply to this letter.

Walker is correct that the defendants were required to provide him with a recorder and tapes. The Seventh Circuit held in *Crawford* v. *Indiana Dept. of Corrections*, 115 F.3d 481 (7th Cir. 1997), that the ADA applies to state correctional institutions. The ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity . . . . ." 42 U.S.C. § 12132. A "qualified individual with a disability"

includes an individual with a disability who, "with . . . the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). It is reasonable to interpret "service, program, or activity" to include whatever reading and educational opportunities are provided to fully sighted inmates.

Under Justice Department regulations promulgated under authority of 42 U.S.C. § 12134, "[a] public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity." 28 C.F.R. § 35.160(b)(1). "Auxiliary aids and services" includes "[q]ualified readers, taped texts, audio recordings, Brailled materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments." 28 C.F.R. § 35.104. If the ADA applies to state correctional institutions, and the Seventh Circuit has held that it does, Walker was entitled to receive books on tape.

But defendants are correct that they are not liable for damages. Under the doctrine of qualified immunity, public officials performing discretionary functions are protected against civil liability if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Wilson* v. *Formigoni*, 42 F.3d 1060, 1064 (7th Cir. 1994) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, (1982)). While the ADA and ancillary regulations make no exception for prisons and state that persons such as

Walker must be provided with auxiliary aids to enable them to participate in state-sponsored programs, some courts believed an exception should be implied, reasoning that Congress would not intentionally put this burden upon the states for the benefit of prisoners being punished for crime. Among those expressing strong doubt that the ADA applied to prisoners (though not holding it did not) were the Fourth Circuit in *Torcasio* v. *Murray*, 57 F.3d 1340 (4th Cir. 1995) and the Seventh Circuit in *Bryant* v. *Madigan*, 84 F.3d 246, 249 (7th Cir. 1996).

Accordingly, the benefit of the ADA was not a clearly established right of state prisoners in 1995 and 1996, and the defendants cannot be liable for damages. Any claim for injunctive or declaratory relief, on the other hand, is moot as to the defendants employed at Stateville, i.e., DeTella, Springborn and Elyea, since Walker is not [*sic*] longer housed there, and this claim is dismissed as to them. However, Odie Washington, Executive Director of IDOC, and Dr. Shuman, Medical Director of IDOC, are presumably in a position to direct the actions of IDOC employees at other institutions, and so they will be retained as defendants for the purpose of injunctive relief, should that still be warranted.

B. Transfer

Walker believed that his disability would be better accommodated at Dixon Correctional Center and sought a transfer there. When his third request for transfer was denied, he filed a grievance, which was likewise denied. When Walker appealed the grievance to the Administrative Review Board, it referred the question of his transfer to defendant Dr. Shuman,

Medical Director of IDOC, Cmplt. Exh. 7. After receiving Dr. Shuman's report, the Board issued a final denial of the grievance, stating that "Dr. Shuman indicated your medical needs can be met at [Stateville] and that the Dixon Correctional Center has no services for the visually impaired." Cmplt. Exh. 8.

A prisoner has no right to choose the correctional facility where he will be housed. *Meachum* v. *Fano*, 427 U.S. 215 (1976). Walker has not disputed Dr. Shuman's statement in his affidavit that there are no facilities for the visually handicapped that cannot be duplicated at Stateville. Def. Mo. Exh. 6 ¶22. This claim is accordingly dismissed, and, as this is the only complaint against Jockisch, she is dismissed as a defendant.

C. Denial of Proper Diet

Walker's blindness is a result of a gunshot wound that broke his jaw and paralyzed the left side of his face. He has no natural teeth and his bottom bridge can't firmly hold dentures, so he requires a soft diet. Walker alleges he did not receive a proper diet, but the allegations of the complaint are vague as to what his problem was and to whom he complained about it. Exhibit 11 to the complaint consists of several items of correspondence. In a grievance dated May 9, 1995, Walker requested "three adequate meals per day." The counselor's response was that Walker was receiving three meals in accordance with IDOC regulations. The grievance officer, however, remanded the grievance to the counselor to determine "whether the issue is of a religious or medical nature." In a letter dated May 17, 1995, Walker stated that "the food is prepared so that I'm not physically able to eat at least 50% of it. Therefore, I'm not being adequately fed." *Id.* A memo

from Carter dated June 1, 1995 refers Walker's grievance to Barbara Miller, the hospital administrator. On July 10, 1995, Walker wrote her a letter requesting a "detailed response thereto." Exhibit 12 consists of a memorandum from dietitian Robin Grady dated May 17, 1995, acknowledging Walker's letters, stating that she would change his diet back to "dental soft," and stating that she could do no more for him. This is followed by medical orders for a soft diet entered at various times. Exhibit 14 is a grievance dated June 1, 1995, in which Walker states that he is not yet receiving the soft diet. The counselor checked with Ms. Grady, confirmed that Walker was to receive a soft diet. Grady also stated that he received 21 cans of Ensure[3] per week.

Exhibit 13 describes a controversy between Walker and the inmate who had the job of serving food. Walker complained that the inmate was not giving him all of his food. The complaint was relayed to the inmate, who confronted Walker "with a negative attitude." Walker announced that he was not going to eat food delivered by this inmate unless he was supervised. In response, Warden DeTella directed that the cellhouse superintendent maintain proper supervision in distribution of meals during lockdowns.

Reading the exhibits together with the complaint, the court cannot say that Walker has even stated a claim with respect to his diet; certainly he has not made a sufficient showing to avoid summary judgment.

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[3] Ensure is a commercially prepared liquid food intended as a complete diet for persons who cannot eat solid food or as a supplement for those who have difficulty eating enough solid food to maintain proper nutrition.

Prisoners challenging their conditions of confinement must satisfy the test established by the Supreme Court in *Wilson* v. *Seiter*, 501 U.S. 294 (1991). The *Wilson* test has an objective prong and a subjective prong. The objective test asks whether the condition of which the prisoner complains is sufficiently severe, whether the prisoner has been denied "'the minimal civilized measure of life's necessities.'" *Farmer* v. *Brennan*, 511 U.S. 825, 834 (1994) (quoting *Rhodes* v. *Chapman*, 452 U.S. 337, 347 (1981)). This is a high threshold—the Supreme Court has held that "extreme deprivations are required to make a conditions of confinement claim." *Hudson* v. *McMillian*, 112 S. Ct. 995, 1000 (1992).

The subjective prong of the *Wilson* test requires that the defendants have acted with the requisite mental state—intent or "deliberate indifference." *Wilson*, 502 U.S. at 300-02. "Deliberate indifference" amounts to criminal recklessness. Under this standard "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer* at 837.

The Constitution does not mandate comfortable prisons, *Rhodes*, 452 U.S. at 347, nor does it mandate tasty meals. Food is obviously a necessity of life that may not be denied to prisoners, but the constitutional standard is "nutritionally adequate food that is prepared and served under conditions which do not present an immediate danger to the health and well being

of inmates who consume it." *French* v. *Owens*, 777 F.2d 1250, 1255 (7th Cir. 1985), cert. denied, 479 U.S. (1986). Walker stated in his deposition that he did not think he should have to eat pureed food and drink Ensure every day instead of having regular food prepared so he could eat it, but Walker does not claim that this diet was not nutritionally adequate. Def. Mo. Exh. A, Walker dep. at 55-56. Dr. Elyea, Medical Director at Stateville, states in his affidavit that Walker received a nutritionally adequate diet and gained ten pounds while at Stateville. Def. Mo. Exh. 1, Elyea Aff. at ¶¶ 6-8. Walker did not suffer a deprivation of constitutional proportions. Even if for a time Walker did not receive appropriate food, Walker's verified complaint does not permit the inference that any of the defendants were deliberately indifferent to his health. This claim is dismissed.

D. Other Medical Claims

Claims of denial of medical care or inadequate medical care are likewise considered Eighth Amendment claims of cruel and unusual punishment. The prisoner must have a condition that can be considered serious and its neglect must amount to punishment. This again requires that the defendant either intended that the prisoner suffer, or acted with deliberate indifference to his health or safety. Negligence or inadvertence that would support a medical malpractice claim under state law is not a constitutional violation. *Gutierrez* v. *Peters*, 111 F.3d 1364, 1369-70 (7th Cir. 1997).

Walker states that he "continually informed defendant DeTella of his disabilities and his not receiving adequate medical and health care via grievances and

direct letters. Regardless, those complaints were and continue to be neglected." Cmplt at 5. He states that "[defendant Springborn]'s negligence has and continue to cause plaintiff to continuously suffer, i.e., permanent damage to plaintiff's vision (left eye) permanent psysical [sic] pain and mental anguish." Cmplt. at 7. He repeats this allegation as to defendant Elyea. Cmplt. at 9. He alleges that defendant Shuman is responsible for causing his request for transfer to be denied because he reported that Walker was appropriately placed at Stateville. This somehow "contributed to plaintiff's pain, suffering, and visual damage." Cmplt. at 11.

Walker attempts to support these vague allegations with two exhibits. Exhibit 15 is a letter dated August 6, 1995, written to defendant Dr. Elyea. Walker alleges he received no answer to it. The letter states that since his surgery was rescheduled on June 23, 1995, he has been in continuous pain and has been telling the medical technician that he wants to see a doctor in order to have the pain medication renewed. The technician allegedly kept saying that this would be arranged, but nothing was done. Walker also asked to see an eye doctor because his vision was getting worse, and asked "what's the status of my surgery?"

Exhibit 16 is a report of an ophthalmology consultation dated June 19, 1995. The ophthalmologist's recommendation was that Dr. Elyea see Walker "to respond to grievance re disability." Elyea approved the recommendation on June 21, 1995 with the note "to U. of Ill for surgery."

While the court must construe a *pro se* plaintiff's filings liberally, it is not up to the court to create allegations to fill the gaps. Constant pain can amount to a

serious condition to which correctional officials may not be indifferent. Nevertheless, Walker only alleges that Elyea did not answer his letter, not that nothing was done for his pain after he wrote the letter. Denial of necessary surgery could state a claim, but Walker does not allege either the surgery was medically necessary or that he asked that the surgery be performed on him. It appears from the complaint at pp. 5-6 that Walker had reservations about the surgery that was to be performed and never actually consented to it. While Walker had the right to refuse treatment, the Constitution did not give him a right to select an alternative treatment that he preferred. See *Snipes* v. *DeTella*, 95 F.3d 586, 590 (7th Cir. 1996) ("Medical decisions . . . such as whether one course of treatment is preferable to another, are beyond the Amendment's purview").

Again, even if these allegations stated a claim on the face of the complaint, defendants would be entitled to summary judgment. Walker has not disputed Dr. Elyea's statement that Walker refused surgery and that the treatment rendered to him at Stateville was medically appropriate. Elyea Aff., Def. Exh 1 at ¶¶ 11-12.

CONCLUSION

All defendants are entitled to summary judgment on all claims except those arising under the ADA. As to Walker's ADA claims, Walker is not entitled to damages; at most, Walker might be entitled to declaratory and injunctive relief. Because Walker is no longer housed at Stateville, any claim for injunctive or declaratory relief against those defendants employed at Stateville is moot. Accordingly, all defendants except

Washington and Shuman are entitled to summary judgment.

As for defendants Washington and Shuman, although they are entitled to summary judgment on Walker's claim for damages, a claim for injunctive relief *may* be viable, since their authority extends beyond Stateville to the institution where Walker is currently housed. But the complaint does not allege ongoing violations of the ADA, or any violations extending beyond his transfer from Stateville to Dixon, and it must be dismissed. Nevertheless, Walker does allege an ongoing refusal to comply with the ADA as of the time of the original complaint, and the defendants' submissions do not show that there is no issue of material fact as to whether IDOC has since taken reasonable measures to insure that disabled prisoners such as Walker receive the benefits mandated by the ADA.

Accordingly, if Walker believes that his treatment continues to violate the ADA, within thirty days of this order he may move for leave to file an amended complaint, naming as defendants Washington and any other person he believes to be directly responsible for the violation. He should explain exactly what he believes each violation to be and what he believes each defendant should do about it. The court will review the motion and the amended complaint and determine

whether it states a claim such that the defendants should be required to answer it.

IT IS SO ORDERED.

/s/ BLANCHE M. MANNING
BLANCHE M. MANNING, Judge
United States District Court

DATED: 1/23/98

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 96 C 0469
Judge Blanche M. Manning

JOHN WALKER, PLAINTIFF

v.

ODIE WASHINGTON, DIANE JOCKISCH, GEORGE DETELLA, WARDEN SPRINGBORN, DR. ELYEA, AND DR. HARRY SHUMAN, DEFENDANTS

MEMORANDUM OPINION AND ORDER

Plaintiff John Walker, a prisoner in the custody of the Illinois Department of Corrections (IDOC) presently housed at Hill Correctional Center, brought this *pro se* civil rights action against IDOC officials alleging violations of the Eighth Amendment and the Americans With Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., while he was housed in Stateville Correctional Center. Walker is legally blind, and he claimed that Stateville officials had not accommodated his handicap as required by the ADA. Walker also raised other claims relating to the conditions of his confinement. The defendants moved for summary judgment on all claims.

By memorandum opinion and order dated January 23, 1998, (the "Order"), the court granted defendants'

summary judgment motion as to Walker's Eighth Amendment claims. With respect to his claims under the ADA, the court noted that since this suit was filed the Seventh Circuit had held in *Crawford* v. *Indiana Department of Corrections*, 115 F.3d 481 (7th Cir. 1997), that the ADA applies to prisoners. Nevertheless, because the law had been unsettled at the time of the events giving rise to this suit, all defendants were entitled to qualified immunity as to any damage claims. Because Walker was no longer at Stateville, Walker's claims for injunctive relief were moot as to all defendants except IDOC Director Odie Washington and IDOC Medical Director Dr. Harry Shuman. Because it was possible that these defendants had supervisory responsibility with respect to the institution in which Walker is presently housed, Walker was directed to file an amended complaint limited to claimed ongoing violations of the ADA. The complaint was to name Washington and any other person Walker believes to be directly responsible for the violation.

Walker filed both an amended complaint and a motion for a temporary restraining order on February 11, 1998. The court had anticipated using the power granted by the Prison Litigation Reform Act ("PLRA") to review the complaint before ordering the defendants to respond. See 28 U.S.C. §§ 1915A, 1915(e)(2).[1]

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[1] The Order at p. 11 stated:

> [I]f Walker believes that his treatment continues to violate the ADA, . . . he may move for leave to file an amended complaint, naming as defendants Washington and any other person he believes to be directly responsible for the violation. . . . The court will review the motion and the amended complaint and determine whether it states a claim such that the defendants should be required to answer it.

Nevertheless, defendants promptly moved to dismiss the amended complaint.

Defendants' motion is of little help because it raises questionable or fallacious arguments while largely ignoring the substance of the amended complaint. Defendants invoke the PLRA's exhaustion requirement without explaining how it applies to an amended complaint filed in a case brought prior to the effective date of the PLRA.[2] Defendants mistakenly assert that "no constitutional violation occurs where public employees conduct themselves according to established policies and where such conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," Def. Br. at 6,[3] citing *Harlow* v. *Fitzgerald*, [457 U.S. 800, 818], 102 S. Ct. 2727, 2738 (1982). A reading of that citation would make clear that qualified immunity applies only to damage claims, not injunctive relief.[4] If the law is not

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[2] The PLRA provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title . . . by a prisoner . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). But can filing an amended complaint be considered "bringing" an action? See *Landgraf* v. *USI Film Products*, 511 U.S. 244, ___, 114 S. Ct. 1483, 1502 n.29 (1994) ("A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime . . ."); *Thurman* v. *Gramley*, 97 F.3d 185, 188 (7th Cir. 1996) (if action brought or appeal filed before effective date of PLRA, payment of PLRA-mandated filing fee is not required).

[3] Page numbers are the court's count—defendants' brief for some reason lacks page numbers.

[4] "We therefore hold that government officials performing discretionary functions, generally are shielded from liability *for civil damages* insofar as their conduct does not violate clearly

clearly established, it does not mean that there can be no *violation*, only that the violator will not be liable for damages. Otherwise the law could never develop, since conduct that had not been held to be a violation of a constitutional or statutory right could never be found to be one.

Defendants contend that the complaint should be dismissed because Walker has not alleged the personal involvement of the defendants and because there is no *respondeat superior* liability under 42 U.S.C. § 1983, Def. Br. at 6-7, ignoring the fact that Walker's remaining claims are brought under the ADA, not § 1983. Also true but irrelevant is defendants' statement that Walker has no right to choose where he will be housed, Def. Br. at 4, which ignores Walker's real contention that the ADA gives him a right to be housed where his handicaps are accommodated.

But whether or not defendants have met their burden as moving parties, the PLRA requires the court to determine whether the amended complaint states a claim. In accordance with *Swofford* v. *Mandrell*, 969 F.2d 547, 549 (7th Cir. 1992), we construe the allegations of the amended complaint and the motion for temporary restraining order together.

It does not appear that Walker understood the Order. Walker's amended complaint does not name officials at Hill Correctional Center, but asserts that dismissed defendants DeTella, Elyea and Springborn violated his rights under the ADA. DeTella, Ellyea and

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established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818 (emphasis added).

Springborn were the warden, medical director and assistant warden, respectively, at Stateville. As the court stated in the Order, any violations of the ADA that occurred while Walker was in Stateville cannot support a claim for damages because it was not established that the ADA applied to prisoners before the Seventh Circuit issued its decision in *Crawford* on June 2, 1997. (For the same reason, Walker has no claim for damages against officials at Dixon.)[5] As the court stated in the Order, Walker can seek prospective relief, but only from defendants who are in a position to order the relief he seeks.

The court permitted Walker to amend because it appeared that he had alleged at least one potential violation of the ADA: that he was not receiving books on tape that would allow him to participate in the benefit offered other prisoners through the prison library. It was possible that this was a violation, it was possible that it was continuing, and also possible that Washington had the power to correct it, making him a proper defendant for injunctive relief.

It appears from Walker's submissions that he is receiving books on tape. He complains that he has been required to sign blank vouchers allowing IDOC to charge his account.[6] This does not state a claim.

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[5] According to Walker's Motion for TRO, he was transferred from Stateville to Dixon in September of 1995 and from Dixon to Hill in December of 1996.

[6] "Officials here at Hill C.C. and Odie Washington et al. are refusing to allow me auxiliary aids—as I received at Dixon C.C. . . . unless I *unnecessarily* sign money vouchers which would allow them to deduct *any amount* from my account." Motion for TRO ¶ 16.

Walker does not allege that a cassette player and cassettes have not been made available to him free of charge. According to a memo from Robin E. Jones, Librarian at Hill Correctional Center, dated July 15, 1997, Amd. Cmplt. Exh. 7, Walker was required to sign vouchers so that he could be charged for equipment from Talking Books that was lost or damaged; he was not required to pay for the use of it. Walker contended in a grievance that he should not have to sign the vouchers because the equipment will be replaced free of charge if it is broken, making the vouchers unnecessary. The librarian at Hill responded that the equipment is loaned to the prison library, not the inmate, and the voucher is to protect the library if an inmate takes the equipment with him or if it is lost or stolen.

This dispute appears to be purely a matter of principle at this point, since Walker does not allege he has been charged. As Walker does not allege that he is likely to lose or break the equipment in the future, it is doubtful that there is even a genuine controversy to support federal jurisdiction. As Walker has not been excluded from, or denied the benefit of, any program or activity, these allegations do not state a claim under the ADA.

Both in the original and amended complaints Walker's primary contention has been that he is not being housed appropriately for his handicap. Walker states in his amended complaint:

> 1. I'm continually being inadequately housed (lighting and space) which cause continual physical injuries and—permanent—visual damage. (Amd. Cmplt. ¶ 5(a))

2. I'm placed in [an environment] that are so overpopulated [that] I continually walk into people and knock over things. Most inmates respond negatively to that; that cause me mental distress and humiliation. It's unsafe. (Amd. Cmplt. ¶ 5(b))

3. I'm normally housed with someone who take negative advantage of my disabilities, e.g., stealing my things and not wanting the light on, etc. that cause me to suffer from mental stress and humiliation. (Amd. Cmplt. ¶ 5(c))

Walker misunderstands the scope and reach of the ADA. The ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity. . . ." 42 U.S.C. § 12132. Incarceration as such is not a "program" or "activity." *Crawford*, 115 F.3d at 483. Incarceration of offenders is clearly a governmental "benefit" for the rest of society, not for the prisoners. While the normal incidents of incarceration may be more uncomfortable for someone with Walker's disabilities, this does not violate the ADA. The ADA does not require that prison officials ameliorate the prison experience for prisoners with disabilities, but only forbids excluding disabled inmates from programs or activities available to other inmates that, with reasonable accommodation, could be made available to them as well. "They [disabled inmates] have no right to more services than the able-bodied inmates, but they have a right, if the Act is given its natural meaning, not to be treated even worse than those more fortunate inmates." *Id.* at 486.

Walker's allegations of overcrowding and being housed with those who resent his unavoidable clumsiness or take advantage of him do not show a violation of the ADA. Non-disabled inmates are legally entitled neither to uncrowded prisons (within the limit of cruel and unusual punishment), nor to tolerant and honest cellmates. Interpersonal friction at close quarters is simply part of prison life, and Walker's disability does not exempt him from it. That does not mean, of course, that correctional officers may permit Walker to be abused by other inmates, but Walker has not alleged any immediate threat of physical injury.

Walker appears to believe that just as handicap-discrimination laws require the state to provide handicapped children with educational opportunities appropriate to their special needs, so he is entitled to an "appropriate" incarceration. The court infers from his complaints of inadequate space and lighting that Walker wants a brightly lit, spacious cell to himself where he can cope more comfortably with his limited vision without the tension that arises when a cellmate is asked to make allowances for his needs. See Walker's July 3, 1997, letter to Hill Correctional Center Warden Gramley, Amd. Cmplt. Exh. 10.

Walker is not entitled to such treatment, however much compassion may recommend it. Unlike education, incarceration is not a benefit the state offers to its citizens. Incarceration is a punishment, and the Constitution does not require it to be comfortable. *Rhodes* v. *Chapman*, 452 U.S. 337, 349 (1981). As long as a prisoner's disability does not result in the denial of basic human needs, the state is not required by the Eighth Amendment to compensate for the additional suffering

caused by a prisoner's handicap by adjusting the conditions of his confinement. To the extent the state does offer benefits to prisoners such as libraries, educational programs and the like, the ADA requires reasonable accommodation in order to permit disabled prisoners to participate in them, but that is all.

Walker's allegation that inadequate lighting and space is causing him "continual physical injuries and—permanent—visual damage" requires brief comment. Walker does not allege what physical injuries he has suffered. Perhaps he means that he occasionally bumps into things, causing him pain. Walker alleged in his original complaint that he was suffering from deteriorating eyesight, but in responding to defendants' motion for summary judgment he did not rebut the statement in Shuman's May 13, 1997, affidavit that Walker's medical records showed no deterioration in his vision since his arrival at Stateville. Shuman Aff. ¶20, Def. MSJ Exh. 6. Walker does not state why he believes his vision has deteriorated since that time and how the conditions of his confinement are responsible.

While the court is required to construe a *pro se* complaint liberally, at some point a plaintiff has the responsibility of providing definite allegations. In the Order, Walker was instructed to "explain exactly what he believes each violation [of the ADA] to be and what he believes each defendant should do about it." Vague statements that Walker believes he is not being properly cared for are not enough at this point to keep this suit alive. Further, the amended complaint was to be limited to ADA claims, and inadequate medical care for a disability is not a concern of the ADA. See *Bryant* v. *Madigan*, 84 F.3d 246, 249 (7th Cir. 1996).

The Amended Complaint is accordingly dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B) for failure to state a claim upon which relief may be granted. Because the original complaint did state a claim under the ADA, which only became moot as a consequence of Walker's subsequent transfer, this dismissal does *not* count as one of Walker's three allotted dismissals under 28 U.S.C. § 1915(g). Defendants' motion to dismiss and all other pending motions are denied as moot.

If Walker wishes to appeal this dismissal, he may file a notice of appeal with this court within thirty days of the entry of judgment. Rule 4(a)(4), Fed. R. App. P. If he does so, he will be liable for the $105 appellate filing fee. Unless he is granted leave to proceed in forma pauperis, he will have to pay the fee immediately. If he cannot do so, the appeal will be dismissed but he will remain liable for the fee and it will be deducted from his inmate trust account in installments. *Newlin* v. *Helman*, 123 F.3d 429, 434 (7th Cir. 1977). If this court finds that the appeal is taken in bad faith, and the Court of Appeals agrees, he will not be permitted to proceed in forma pauperis and pay the fee in installments, but will have to pay the fee immediately or the appeal will be dismissed. 28 U.S.C. § 1915(a)(3); *Newlin*, 123 F.3d at 433-34. To avoid a finding that the appeal is taken in bad faith, a motion to proceed in forma pauperis on

appeal should explain the grounds for the appeal. See *Newlin*, 123 F.3d at 433.

IT IS SO ORDERED.

/s/ BLANCHE M. MANNING
BLANCHE M. MANNING, Judge
United States District Court

DATED: JUN. 9, 1998

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 96 C 469 BLANCHE M. MANNING, *JUDGE*
No. 98-3308

JOHN WALKER, PLAINTIFF-APPELLANT

v.

DONALD N. SNYDER JR., DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL., DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

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July 12, 2000

Order

Before: Hon. William J. Bauer, Circuit Judge; Hon. Frank H. Easterbrook, Circuit Judge; Hon. Kenneth F. Ripple, Circuit Judge

The United States has filed a letter that we treat as a petition for rehearing. In response to this petition, the

court replaces the two full paragraphs at slip op. 4 with the following language:

> Because defendants have been sued and could be liable only in their official capacities, we must consider their argument that the eleventh amendment closes the doors of the federal courts. Although the commerce clause gives Congress ample authority to enact the ADA, legislation based only on the commerce clause does not subject states to private litigation in federal court. Legislation based in § 5 of the fourteenth amendment, by contrast, supports private litigation. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976).
>
> In the wake of *Kimel* v. *Florida Board of Regents*, 120 S. Ct. 631 (2000), we have held that § 5 does not afford Congress the authority to enact Title I of the ADA. *Erickson* v. *Board of Governors for Northeastern Illinois University*, 207 F.3d 945 (7th Cir. 2000); *Stevens* v. *Illinois Department of Transportation*, 210 F.3d 732 (7th Cir. 2000). Our opinion in *Erickson* reserved questions concerning other titles of the ADA, which potentially have different scope. But Walker's claim falls squarely within both *Erickson*'s and *Stevens*'s reasoning, for those cases concluded that Title I of the ADA cannot be based on § 5 to the extent that it requires accommodation of disabilities (rather than simply requiring the state to disregard disabilities) and to the extent that it forbids a state to take account of disabilities that are rationally related to permissible objects of public action. Walker wants Illinois to accommodate rather than ignore his disability. He does not contend (and could not reasonably contend)

that it is irrational for a state to ask for repayment if loaned property is lost or damaged, or to put a prisoner in a two-person cell.

Walker relies not only on § 5 but also on *Ex parte Young*, 209 U.S. 123 (1908), which holds that many suits against state officers in their own names are outside the eleventh amendment, at least to the extent they concern prospective rather than monetary relief. See, e.g., *Will*, 491 U.S. at 71 & n.10; *Young*, 209 U.S. at 159-60. But a suit based on *Young* is a suit against state officers as individuals, not against the state itself. We held above that the only proper defendant in a[n] action under the provisions of the ADA at issue here is the public body as an entity. A suit resting on the *Young* approach is not a suit against the public body and therefore cannot support relief. Walker must pursue all of his ADA theories in state court.

The revised language does not occasion any change in the judgment, so the petition for rehearing is denied.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

NO. 96 C 469 BLANCHE M. MANNING, *JUDGE*
No. 98-3308

JOHN WALKER, PLAINTIFF-APPELLANT

v.

DONALD N. SNYDER JR., DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL., DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

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August 29, 2000

Order

Before: Hon. William J. Bauer, Circuit Judge; Hon. Frank H. Easterbrook, Circuit Judge; Hon. Kenneth F. Ripple, Circuit Judge

Plaintiff-appellant John Walker filed a petition for rehearing on June 28, 2000. All of the judges on the

panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX F

CONSTITUTION OF THE UNITED STATES

AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

THE AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. 12101 *ET SEQ.* (1994 & SUPP. IV 1998)

§ 12101. Findings and purpose

(a) Findings

The Congress finds that—

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barri-

ers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Title II, Part A, of the Americans With Disabilities Act

§ 12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of title 49).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

§ 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be

denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

§ 12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable

to federally conducted activities under section 794 of title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

Title IV of the Americans With Disabilities Act

§ 12201. Construction

(a) In general

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

(b) Relationship to other laws

Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter. Nothing in this chapter shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment covered by subchapter I of this chapter, in transportation covered by subchapter II or III of this chapter, or in places of public accommodation covered by subchapter III of this chapter.

(c) Insurance

Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict—

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or

entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter[1] I and III of this chapter.

(d) Accommodations and services

Nothing in this chapter shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept.

§ 12202. State immunity

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in[1] Federal or State court of competent jurisdiction for a violation of this chapter. In any action

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1 So in original. Probably should be "subchapters".

1 So in original. Probably should be "in a".

against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

§ 12203. Prohibition against retaliation and coercion

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(c) Remedies and procedures

The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter I, subchapter II and subchapter III of this chapter, respectively.

§ 12204. Regulations by Architectural and Transportation Barriers Compliance Board

(a) Issuance of guidelines

Not later than 9 months after July 26, 1990, the Architectural and Transportation Barriers Compliance Board shall issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of subchapters II and III of this chapter.

(b) Contents of guidelines

The supplemental guidelines issued under subsection (a) of this section shall establish additional requirements, consistent with this chapter, to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities.

(c) Qualified historic properties

(1) In general

The supplemental guidelines issued under subsection (a) of this section shall include procedures and requirements for alterations that will threaten or destroy the historic significance of qualified historic buildings and facilities as defined in 4.1.7(1)(a) of the Uniform Federal Accessibility Standards.

(2) Sites eligible for listing in National Register

With respect to alterations of buildings or facilities that are eligible for listing in the National Register of

Historic Places under the National Historic Preservation Act (16 U.S.C. 470 et seq.), the guidelines described in paragraph (1) shall, at a minimum, maintain the procedures and requirements established in 4.1.7(1) and (2) of the Uniform Federal Accessibility Standards.

(3) Other sites

With respect to alterations of buildings or facilities designated as historic under State or local law, the guidelines described in paragraph (1) shall establish procedures equivalent to those established by 4.1.7(1)(b) and (c) of the Uniform Federal Accessibility Standards, and shall require, at a minimum, compliance with the requirements established in 4.1.7(2) of such standards.

§ 12205. Attorney's fees

In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

* * * * *

§ 12208. Transvestites

For the purposes of this chapter, the term "disabled" or "disability" shall not apply to an individual solely because that individual is a transvestite.

§ 12209. Instrumentalities of Congress

The General Accounting Office, the Government Printing Office and the Library of Congress shall be covered as follows:

(1) In general

The rights and protections under this chapter shall, subject to paragraph (2), apply with respect to the conduct of each instrumentality of the Congress.

(2) Establishment of remedies and procedures by instrumentalities

The chief official of each instrumentality of the Congress shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to paragraph (1).

(3) Report to Congress

The chief official of each instrumentality of the Congress shall, after establishing remedies and procedures for purposes of paragraph (2), submit to the Congress a report describing the remedies and procedures.

(4) Definition of instrumentality

For purposes of this section, the term "instrumentality of the Congress" means the following:,[1] the General Accounting Office, the Government Printing Office, and the Library of Congress,.[1]

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[1] So in original. The comma probably should not appear.

(5) Enforcement of employment rights

The remedies and procedures set forth in section 2000e-16 of this title shall be available to any employee of an instrumentality of the Congress who alleges a violation of the rights and protections under sections 12112 through 12114 of this title that are made applicable by this section, except that the authorities of the Equal Employment Opportunity Commission shall be exercised by the chief official of the instrumentality of the Congress.

(6) Enforcement of rights to public services and accommodations

The remedies and procedures set forth in section 2000e-16 of this title shall be available to any qualified person with a disability who is a visitor, guest, or patron of an instrumentality of Congress and who alleges a violation of the rights and protections under sections 12131 through 12150 of this title or section 12182 or 12183 of this title that are made applicable by this section, except that the authoriies of the Equal Employment Opportunity Commission shall be exercised by the chief official of the instrumentality of the Congress.

(7) Construction

Nothing in this section shall alter the enforcement procedures for individuals with disabilities provided in the General Accounting Office Personnel Act of 1980 and regulations promulgated pursuant to that Act.

§ 12210. Illegal use of drugs

(a) In general

For purposes of this chapter, the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) of this section shall be construed to exclude as an individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs; however, nothing in this section shall be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.

(c) Health and other services

Notwithstanding subsection (a) of this section and section 12211(b)(3) of this title, an individual shall not be denied health services, or services provided in connection with drug rehabilitation, on the basis of the current illegal use of drugs if the individual is otherwise entitled to such services.

(d) "Illegal use of drugs" defined

(1) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(2) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C. 812].

§ 12211. Definitions

(a) Homosexuality and bisexuality

For purposes of the definition of "disability" in section 12102(2) of this title, homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter.

(b) Certain conditions

Under this chapter, the term "disability" shall not include–

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; or

(3) psychoactive substance use disorders resulting from current illegal use of drugs.

§ 12212. Alternative means of dispute resolution

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.

§ 12213. Severability

Should any provision in this chapter be found to be unconstitutional by a court of law, such provision shall be severed from the remainder of the chapter, and such action shall not affect the enforceability of the remaining provisions of the chapter.

Supreme Court, U.S.
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No. 00-554

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

DONALD N. SNYDER, Director of the Illinois Department of Corrections, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

In 1996, John Walker ("Walker"), a prisoner in the custody of the Illinois Department of Corrections ("DOC"), filed a complaint alleging, *inter alia*, violations of the Americans With Disabilities Act, 42 U.S.C. §§ 12131 *et seq.* ("ADA"). Walker has no vision in his right eye and poor vision in his left eye. He asserted that he was entitled to damages and injunctive relief under the ADA because the DOC had failed to provide him with audio books and a tape recorder, a brightly lit cell to himself, and a transfer to a more accommodating prison facility.

The district court determined that the ADA did not entitle Walker to a brightly lit cell or a prison transfer, but it did entitle him to audio books and a tape recorder. (Pet. App. 11a-12a). The court held, however, that the DOC defendants had qualified immunity for damages resulting from any refusal to provide the audio books and recorder before 1997 because the application of the ADA to state prisoners was not clearly established in the Seventh Circuit until *Crawford v. Indiana Dept. of Corrections*, 115 F.3d 481 (7th Cir. 1997). (Pet. App. 12a-13a). The court dismissed the complaint but allowed Walker to file an amended complaint to seek injunctive relief requiring the DOC to provide the requested equipment. (Pet. App. 20a).

In his amended complaint, Walker acknowledged that the DOC had provided him with a tape recorder and tapes since at least mid-1997, albeit with a requirement that he sign a form acknowledging financial responsibility for loss or damage to the equipment. (Pet. App. 26a). He did not indicate if there was a period during which

the DOC had refused to provide him with such equipment at all. Based on these allegations, the district court held that Walker's claim for injunctive relief was moot and dismissed the amended complaint. (Pet. App. 26a-27a).

Walker appealed the dismissals of his original and amended complaints to the Seventh Circuit. On appeal, the DOC defendants argued, in addition to mootness and qualified immunity, that the Eleventh Amendment barred Walker's ADA claim to the extent that that claim was made against the state. The Justice Department intervened to defend the constitutionality of the ADA's application to the states.

In its decision, the Seventh Circuit rejected the district court's qualified immunity analysis. (Pet. App. 3a-4a). The court held that ADA damages could be sought against the defendants only in their official capacity, and that qualified immunity could not protect persons sued in their official capacity. *Id.* Thus, Walker's claim for ADA damages against the DOC for the period, if any, when the DOC denied audio equipment to Walker was not barred by qualified immunity. The court nonetheless instructed the district court to dismiss the ADA claims on Eleventh Amendment grounds. (Pet. App. 4a-6a). The court held that Congress lacked authority to enact the ADA under section 5 of the Fourteenth Amendment and therefore could not subject states to ADA damage actions in federal court. *Id.* The court's opinion, as revised pursuant to a Petition for Rehearing filed by the Justice Department, was issued on July 12, 2000.

Walker filed a petition for rehearing with the Seventh Circuit which was denied on August 29, 2000. (Pet. App.

36a-37a). Walker has not filed a petition for writ of certiorari seeking review of the Seventh Circuit's decision. His time for doing so expires on November 27, 2000.

REASONS FOR DENYING THE WRIT

The policy of the Illinois Attorney General's Office in cases raising issues currently under review in *Board of Trustees of the University of Alabama v. Garrett*, No. 99-1240, has been to support the holding of petitions for writ of certiorari pending the issuance of the *Garrett* decision. *See, e.g.*, Memorandum of Respondent filed in *Stevens v. Illinois Dep't of Transp.*, No. 00-7. Because the party claiming relief in this matter has not sought certiorari, however, the usual policy should not apply here. The United States' petition for writ of certiorari should be denied because the United States lacks a sufficient stake in the outcome of this controversy to confer jurisdiction under Article III, let alone to justify certiorari.

The United States intervened before the court of appeals for the sole purpose of asserting a legal argument with respect to the application of the ADA to the states. While the United States had the authority to intervene in the appellate court to assert the "interests of the United States" in the application of the ADA to Walker's claims, *see* 28 U.S.C. § 517, this intervention did not cloak the United States with standing to assert these claims in Walker's absence. The plaintiff, John Walker, has not filed a petition for certiorari in this case and therefore would not be entitled to relief even if the Court were to reverse the Seventh Circuit's judgment. Moreover, the legal issue of the ADA's application to states is

already before the Court in *Garrett*. Therefore, there is no reason for this Court to grant certiorari in this case.

Although intervening parties are entitled to seek review in the Supreme Court, "an intervenor's right to appeal in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Article III." *Diamond v. Charles*, 476 U.S. 54, 68 (1986). When the original party fails to appeal and the intervenor has no personal actual or threatened injury, there is simply no case or controversy for the Court to decide. *Id.* at 63-68. Thus, in *Diamond*, an intervenor's petition to review a decision striking down a state abortion law was dismissed because the state, which would have had standing as the law's enforcer, failed to appeal. Only if the state had appealed could the intervenor have "'piggyback[ed]' on the State's undoubted standing . . . ; in the absence of the State in that capacity, there is no case for [the intervenor] to join." *Diamond*, 476 U.S. at 64.

This Court's decision in *Director, Office of Workers' Compensation Program v. Perini North River Assoc.*, 459 U.S. 297 (1983), is not to the contrary. In *Perini*, the Office of Workers' Compensation joined with an employee in challenging an administrative law judge's determination that the employee was not covered under the Longshoremen's and Harbor Workers' Compensation Act. *Id.* at 301. The appellate court ruled against the employee and the Office of Workers' Compensation, but only the Office of Workers' Compensation filed a petition for writ of certiorari. The respondent asserted that the failure of the employee to seek review as a petitioner was fatal to the certiorari request.

The Court agreed that standing requires an "'actual injury redressable by the court,'" so that legal questions will be resolved "'not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action,' as well as to assure 'an actual factual setting in which the litigant asserts a claim of injury in fact.'" 459 U.S. at 305. Despite this concern, the Court in *Perini* determined that there was a justiciable controversy for two reasons. First, the Supreme Court rules then in effect—and since changed—provided that all parties to the proceeding below were automatically parties in the Supreme Court. *See* Sup. Ct. R. 19.6 (1984) (superseded 1990), reprinted in 23 *Moore's Federal Practice* § 512App.01 (Matthew Bender 3d ed.); Sup. Ct. R. 12.4 (1990) (superseded 1995), reprinted in 23 *Moore's Federal Practice* § 512App.02 (Matthew Bender 3d ed.). Thus, even without filing a petition for certiorari, the injured employee was a party before the Court. Second, while the injured employee did not seek review in the Supreme Court as a petitioner, he did file a brief in support of the Director's request for certiorari and a brief addressing the merits of his claim. *Id.* at 304-05.

However, the Supreme Court rule on which the Court relied in *Perini* has been amended and no longer treats all parties to the proceedings below as parties on appeal. To the contrary, the current rules provide only that parties to the proceedings below are "entitled to file documents." Sup. Ct. R. 12.6 (2000). Current rule 12.6 further explicitly provides that "[p]arties who file no document will not qualify for any relief from this Court." *Id.* These amendments make clear that a party to an appellate pro-

ceeding is not necessarily a party in the Supreme Court simply because another party has filed for review.

If Walker were a party to this petition, a reversal of the Seventh Circuit's judgment in this case would result in a remand to the district court for a determination of whether Walker was ever denied audio equipment, and if so, whether he was entitled to ADA damages for such denial. Thus, if Walker were a party to this petition, the respondents would not oppose the United States' request to hold its petition pending the Court's decision in *Garrett*. But because Walker has not filed a petition of his own in this Court (and assuming that he does not file one in the next few days) he will not be entitled to relief. As far as Walker is concerned, this case will be over. Therefore, even if this Court vacated the court of appeals' decision, nothing more would or could occur in this case.

The sole interest of the United States in this case is to vindicate a legal position, a position that has already been asserted in *Garrett*. There is no issue here about federal enforcement of the ADA because this is a private action involving only Walker's claim to personal damages. The United States may well be interested in defending its legal position on the constitutional basis of the ADA, but "the presence of a disagreement . . . is insufficient by itself to meet Article III's requirements." *Diamond*, 476 U.S. at 62. The United States' petition stands by itself, seeking the resolution of a naked legal question in the absence of a litigant claiming an injury in fact, and the Court will have no jurisdiction over the action if Walker fails to file a petition of his own. Therefore, the petition of the United States should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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